Soon after Judge Story's appointment the corporation purchased his library consisting of over 1,000 volumes, the students having been kindly permitted the use of his books previous to such purchase. The books thus obtained, with the few works on law previously mentioned, formed the nucleus from which the law library as a separate collection has grown; the 3,100 volumes of 1833 having increased to more than ten times that number in 1893.

ANNUAL REPORT OF THE ATTORNEY-GENERAL OF MASSACHUSETTS. — CORRECTION. Last month the REVIEW adopted the Attorney-General's statement that *Com.* v. *Trefethen* was the first case where a capital conviction had been reversed in Massachusetts. It now appears that in *Com.* v. *Hardy*, 2 Mass. 303, a capital conviction secured before Supreme Court sitting *in banc* was reversed by them, and upon a second trial the prisoner was acquitted. So *Com.* v. *Trefethen* is at least not the first case.

COUNSEL AND COURT. — It has often been regretted that American methods of reporting do not reach the colloquy between judges and counsel in the course of the argument. Lately, in England, a manufacturer who had bought belting for his machinery "warranted for ten years," insisted upon using it after it was useless, and in order to sue each year for the accruing damages. When his counsel appeared in court to press this claim the following dialogue took place: —

Lord Coleridge: "And you actually insist that your client, the plaintiff, may go on using a thing which he says is of no use, not for the purpose of using it, but for the purpose of bringing repeated actions for his not being able to use it; and that, too, notwithstanding an offer to take it back and return the money?" *Chitty* (for the plaintiff): "Yes, that is our claim." *Lord Coleridge:* "Then we will try if the law will not enable us to resist it." *Chitty:* "This is not a court of morals but a court of law." *Lord Coleridge:* "True, and what is morality is not always law; but the law ought to be in accordance with morality; and we will try and see if it be not so here. . . ." (10 Times Law Reports, 225.) And the court dismissed the claim. Surely no opinion sent down in cold writing, after the argument, could so effectually dispose of the idea that there is any right to heap up damages for others to pay, unless, as in Shylock's case, it is "so nominated in the bond," and, perhaps, — as in Shylock's case, — not then.

THE REFERENDUM. — That provision of the Constitution of Massachusetts which enables the Legislature to consult the Supreme Court upon judicial questions of importance has recently been put in use to obtain opinions upon what is known as the referendum. The Legislature asked whether it was constitutional to provide that an act (one granting suffrage to women) should take effect (1) throughout the Commonwealth, (2) in cities and towns, upon acceptance by voters; and also whether it could provide that women specially registered might vote upon the first question. The bare majority answered in the negative, Knowlton, J., with them on the first and third questions; Holmes and Barker, JJ., dissenting altogether. The majority base their answer upon the theory that

the Legislature is the agent of the people for the purposes of law making; that this would be in effect shifting the burden of responsibility which the Constitution meant to fix on it, and giving to the people the ultimate legislative authority definitely surrendered by them at the time of the adoption of the Constitution.

The difference between the majority and Mr. Justice Holmes, whose opinion is the most suggestive among those of the minority, seems to be double, lying partly in the different tests of constitutionality adopted, and partly in the question whether or no such acceptance by the people is legislation. While the majority, on the one hand, reject the idea as one not contemplated by the Constitution, Mr. Justice Holmes, on the other, accepts it as one not forbidden. The majority say that the actual enacting legislative force is the vote of the people. Mr. Justice Holmes points out that if such a law "does go into effect, it does so by the express enactment of the legislative body." He agrees that the people may not legislate without an amendment of the Constitution, but does not accept the conclusion that the enactment of laws may not be made to depend on their consent.

It would seem that his may be considered the sounder view. The analogy is stronger to a law which depends, as one may, upon the happening of a future event, or to an agent going back to his principals for instructions and yet performing the duties of his agency himself, than it is to a judge turning cases over to his private secretary for decision, or a governor giving his clerk the power to pardon. And it does not seem a dangerous or unwise use of legislative authority; or, indeed, an arrangement which would have been looked upon by the founders of the Constitution as improper or inexpedient.

"FLOATABLE STREAMS" — COMMERCIAL POWER OF CONGRESS. — In *Gwaltney* v. *Scottish Lumber Co.*, 16 S. E. Rep. 692, there is an interesting discussion by the Supreme Court of South Carolina of the public rights over running streams, though the actual decision turned on a point of small importance. The court lay down the doctrine that, in addition to the generally recognized class of navigable waters, there exists another kind of streams over which the public have rights. These the court call "floatable streams," which, while not navigable by vessels or even smaller craft, are yet of use to the public "in bearing the products of mines, forest, and tillage of the country they traverse to mills and markets." Such streams are public highways, and the rights of the riparian proprietors are subject to an easement in favor of their free use for those purposes to which they are adapted.

The rule here stated is supported by a number of decisions (*Lancey* v. *Clifford*, 54 Me. 487; *Buchanan* v. *Grand River, etc. Co.*, 48 Mich. 364; *Shaw* v. *Oswego Iron Co.*, 10 Oregon, 371), which, while varying more or less as to where the line should be drawn between the concurrent rights of the public and the riparian proprietors, all recognize these streams not technically navigable, but navigable for logs, as public highways. Gould on Waters, 2d ed. sec. 107.

The inherent reasonableness of this doctrine makes it probable that it would be generally followed; and this suggests a possible application of that tremendous piece of machinery, the commercial power of Congress. It has indeed been hitherto generally assumed that the jurisdiction of